Supreme Court, U.S.
FILED

No. 06-_____

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In The

Supreme Court of the United States

EUGENE CAVICCHI,

Petitioner,

v.

MICHAEL CHERTOFF, Secretary of the Department of Homeland Security, and the United States Department of Homeland Security by and through the Bureau of Customs and Border Protection,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN CAVICCHI
Counsel of Record
5 Island Ave. #6d
Miami Beach, FL 33139
(305) 531-3416

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

On June 30, 2006, in *Cavicchi v. Chertoff*, No. 05-770, this Court granted a petition for writ of certiorari on the consolidated record of this case and vacated and remanded for further consideration in light of *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___ (2006). (4a). The following questions are now presented:

1. Whether further review is warranted because the court of appeals did not follow this Court's remand order when it ignored respondents' knowingly false criminal allegations, repeated derogatory and humiliating statements, and respondents' admission regarding the supervisor's conduct.

2. Whether further review is warranted because the respondents also retaliated in the context of the accusatory Internal Affairs interview they conducted in 2001 – the documents they withheld prove that the IA investigation concluded in 1999.

3. Whether further review is warranted because although the court of appeals correctly vacated its judgment regarding the 2002 accusatory IA interview, it should also have vacated the judgment regarding the 2001 accusatory IA interview because of the close temporal proximity of respondents' knowingly false criminal allegations at that interview.

4. Because of respondents' misconduct in the courts below and because this Court rejected their argument that petitioner's claims were barred by *res judicata*, and since the court of appeals departed from precedent, should the Supreme Court also reverse the judgment in petitioner's first case?

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OPINIONS BELOW

On June 30, 2006, in *Cavicchi v. Chertoff,* No. 05-770, this Court granted a petition for writ of certiorari on the consolidated record of this case, i.e., *Cavicchi v. Secretary of Treasury*, No. 04-10451 [hereinafter *Cavicchi I*] and *Cavicchi v. Homeland Security Secretary*, No. 05-11065 [hereinafter *Cavicchi II*], and vacated and remanded for further consideration in light of *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___ (2006). On November 13, 2006, the court of appeals affirmed in part, vacated the judgment of the district court pertaining to the August 2002 Internal Affairs interview, and remanded to the district court for further consideration "in the [sic] light of *Burlington.*" (1-2a). It also denied petitioner's motion and argument that the first appellate panel should have decided the case. (2a n.1). A timely petition for rehearing *en banc* was denied on January 17, 2007. (20a). The opinions of the court of appeals are unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 13, 2006. (1a). Jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343. A timely petition for rehearing *en banc* was denied on January 17, 2007. (20a).

STATUTORY PROVISIONS

The following are reproduced at Appendix F:

Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a).

The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2m.

The Family Medical Leave Act of 1993 (FMLA), Title II, 5 U.S.C. § 6318 et seq., § 6382, § 6383 (c)(1).

The Anti-Retaliation Provision of Title II (FMLA), 5 U.S.C. § 6385.

STATEMENT OF THE CASE

Introduction

On June 30, 2006, the Supreme Court rejected the respondents' sole opposition – *res judicata*, granted certiorari, and vacated and remanded the judgment of the Eleventh Circuit Court of Appeals based on four arguments:

1. The court of appeals ignored respondents' representation that the cases were completely unrelated, petitioner's subsequently developed evidence, and ruled that petitioner's claims were barred by *res judicata*.

2. There is a conflict among the circuits in Title VII discrimination cases whether internal affairs investigations are adverse employment actions

and, in this case, support hostile work environment and retaliation claims.

3. The courts below decided the allegations in an isolated and piecemeal fashion, thereby ignoring *National Railroad Passenger Corp. v. Morgan.*

4. Title VII hostile work environment and retaliation claims, 42 U.S.C. § 2000e-3(a), encompass redress for violations of the Family and Medical Leave Act of 1993, Title II, 5 U.S.C. § 6381 et seq., and the FMLA's Anti-Retaliation Provision, 5 U.S.C. § 6385.

* * *

On remand, the court of appeals directed the parties "to file supplemental briefs addressing the impact of the Supreme Court case on this case."[1] (3a). Because this Court rejected respondents' sole question presented – *res judicata*, and because the court of appeals had previously allowed respondents' motion to supplement the record in *Cavicchi II* with *Cavicchi I*, petitioner filed an unopposed motion to have the case decided by the original appellate panel. Under Eleventh Circuit precedent, one panel cannot reverse another panel. *See Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003). However, in its opinion, the second panel denied the motion and vacated its judgment only regarding the second accusatory IA interview in 2002. (2a).

[1] Petitioner attached his petition for writ of certiorari and his reply brief in support of his petition for writ of certiorari to his Supplemental Brief and Supplemental Reply Brief.

I

Respondents and their attorneys deliberately withheld reports of investigation from the petitioner which were necessary to prosecute his age, sex or gender discrimination case. Subsequently, respondents coordinated their accusatory activity with the timing of the litigation in petitioner's discrimination case. Respondents falsely claimed that petitioner failed to pass an expanded background check because he was the subject of an "ongoing internal affairs [IA] investigation" in 2001 and 2002. In truth, the so-called "ongoing" investigation actually concluded in 1999 and IA notified him that he had indeed passed an updated background investigation five days after the investigation was reported:

> **ROI 001, dated 9/28/99**, "Investigative Findings." The Office of Internal Affairs . . . conducted a criminal investigation based on allegations that U.S. Customs inspectors and vehicle exporters illegally and/or improperly exported vehicles . . . .Several employees became subjects of the investigation, to include Senior Customs Inspector (SI) Eugene Cavicchi. *The investigation has concluded and the allegations pertaining to each subject will be reported independently*. This case will address the following allegations against SI Cavicchi: Preferential Treatment, Conflict of Interest, Dereliction of Duty, and Insubordination, among others (emphasis added). (Supplemental Br. at 4).

The only task remaining for IA was to write a final report, which it did on **October 1, 1999**. Respondents withheld and continue to withhold this report:

> [T]he related *final reports* of investigation are listed for reference as follows: 199507246-IS

> LOCKE; 19905016-SI BARBER 19905344-CI GOMEZ; *19905529-CI CAVICCHI* (emphasis added). *Id.*

On **October 5, 1999**, five days after IA wrote the final report referencing petitioner's final report, the Office of Internal Affairs notified petitioner that he had passed a "high risk public trust" periodic reinvestigation, i.e., an updated background investigation. *Ibid.*

On **September 5, 2003**, respondents notified petitioner that he had been illegally vetted. "[T]he Agency has determined that you were one of the employees recommended for selection but that you were not selected following the completion of the vetting process." (25-26a; Supplemental Reply Br. at 10).

The court below also ignored additional examples of respondents' egregious misconduct. Respondents' attorney:

> 1. Falsely certified that she filed the deposition of IA agent Ives in support of her motion for summary judgment. In truth, the deposition was not filed until long after the judge made his decision. (Supplemental Br. at 6-7).
>
> 2. Substituted petitioner's official, signed and corrected deposition for a differently paginated, unofficial, unsigned deposition, which was missing an exhibit. The pages cited by the respondents in their briefs to the court do not correspond with the deposition the government filed. *Ibid.*
>
> 3. Ignored her client, Debra Herzog, who ordered the case closed, "so that discovery could proceed" and who stated that the IA case against petitioner "concluded" without an interview. *Ibid.*

However, the attorney refused to provide discovery.

4. Admitted that respondents destroyed the work and assignment sheets which showed where petitioner worked and the dates he worked there and later claimed that her admission was "inadmissible hearsay." *Ibid.*

5. Claimed that the affidavit Helen Calvit provided IA in 1998 as the basis for the so-called "ongoing Internal Affairs investigation" in 2001 and 2002 was "inadmissible hearsay" and "stale." *Ibid.*

6. Claimed that official computerized documents, which she delivered in hand in her office were "unauthenticated documents." In truth, these documents showed petitioner was not working on December 19, 1996, the date IA claimed Calvit told him not to process paperwork. *Ibid.*

II

By 2000, the respondents (legacy U.S. Customs Service, now merged with the Department of Homeland Security and now known as U.S. Customs and Border Protection) had employed Petitioner Eugene Cavicchi, then age 50, since 1983. A Senior Customs Inspector, GS-11, he had graduated from high school (Boston Latin) in 1968, college (Holy Cross) in 1972, had been an exchange student (Paris, France), and is State Department certified in French. He spent sixteen years at the Miami Seaport, primarily engaged in law enforcement, i.e., searching vessels and seizing drugs, for which he received numerous commendations, including one from former President

Bush. In 1997, however, he became chronically ill with a debilitating disease, glolumeronephritis: His kidneys ceased functioning. Because of heavy medication, he could no longer work full time, took considerable sick leave, and reduced his workload to part-time, because "I couldn't stay awake at my desk, I was falling asleep at work . . . I could no longer fulfill my duties as an inspector." (*Cavicchi I*, Corrected Br. at 3-4; *Cavicchi II*, Initial Br. at 4-5).

1. Beginning in 1998, petitioner began to take three months unpaid leave under the Family Medical Leave Act [FMLA] to care for his elderly and seriously ill mother, who was suffering from an *incurable and degenerative form of heart disease* – cardiomyopathy. In 2000, after his immediate supervisor approved his request for FMLA leave, it lay unprocessed on Chief Inspector Myra Quirk's desk. Rather than following FMLA procedures, which would have required a second medical opinion (23a), Quirk called the doctor's office, argued with the secretary, and ultimately spoke to the doctor. At the time of Quirk's call, petitioner's mother was eighty-six (86) years old. Quirk later claimed that she had called the doctor because petitioner had presented an unsigned letter, and that he had "whited out" the dates. Quirk also claimed that she had "received several letters . . . some of them had the white-out with the date changed. . . ." Because Quirk had accused petitioner of altering official documents, a crime, he reported her to IA. Respondents refused to produce any documents to substantiate Quirk's allegations. The court, Judge Martinez, took no action on the motion to compel production of these documents (*Cavicchi I*, Corrected Br. at 4-6, 23), declaring it "moot." *Id.* at 23.

2. During his remission from kidney disease and the onset of his conflict with Quirk, he applied for a transfer to

Port Canaveral, a part-time position with a reduction in grade (GS-7). In 1998, he had previously applied for a GS-12/13 Program Officer Position in Miami. He made the best-qualified list, interviewed for the position, but was not selected. Instead of hiring petitioner for the Port Canaveral downgrade, a seaport position, respondents hired two white, entry-level rookie female inspectors from Montana in their twenties, with no seaport experience. One applicant's previous work experience consisted of operating the cash register and cleaning the store in which she worked, "Cuddly Critters." The other applicant underwent seaport training and quit. (*Cavicchi I*, Corrected Br. at 7-11).

3. Approximately two weeks after petitioner filed an EEO complaint in March 2001, IA summoned him to appear at its office for the alleged purpose of a close-out interview about other employees regarding alleged wrongdoing, which occurred several years earlier at a previous work location, the Vehicle Export Station [VES]. Petitioner had left there in *June* 1997. Instead of inquiring about other employees, IA agents Gordon and Ives read him his rights and falsely accused him of favoritism, failure to follow verbal orders and facts amounting to extortion; the incidents allegedly occurred at the VES in *July* 1997. Subsequently, he was informed that he had been "exonerated." (*Cavicchi I*, Corrected Br. at. 8-10).

4. On August 2, 2001, petitioner filed his first lawsuit in the United States District Court for the Southern District of Florida for age, sex or gender, disability discrimination, and violations of FMLA and hostile work environment claims. (*Cavicchi I*). On August 30, 2002, eighteen months after the March 21, 2001 interview, during management depositions, including Quirk and

Gordon, IA agents Crane and Butler appeared at his workplace. Petitioner filed a second EEO complaint. Petitioner had filed discovery requests and motion to compel production of his IA file, however, the respondents refused, citing "privilege," falsely claiming that there "is still a pending Internal Affairs matter involving Mr. Cavicchi." (*Cavicchi I*, Corrected Br. at 24-26). Judge Martinez also declared that motion "moot." *Id.* at 38.

5. Respondents ignored their client, Debra Herzog, Esq., Senior Advisor to the Assistant Commissioner of Internal Affairs. Herzog stated that the IA case against petitioner had concluded without an interview and that the "*age of the case, coupled with a lack of evidence to substantiate the charges will obviate the need for an interview.*" (emphasis added). (*Cavicchi II*, Initial Br. at 7, 19-20, Reply Br. at 5). Herzog ordered the case closed "as is so that discovery could proceed." (Supplemental Br. at 7; *Id.*) Instead, respondents refused to provide discovery and, several months later, on December 23, 2002, respondents' attorney provided a declaration from the selecting official, John Heinrich Jr., who claimed, *inter alia*, that the two entry-level female applicants, "possessed the best knowledge, skills and experience," and that petitioner "did not clear the expanded background check since he was the subject of an ongoing Internal Affairs investigation." Heinrich also claimed that he "had no knowledge of petitioner's *age, gender . . . , or alleged disability*" (emphasis added). Furthermore, when Heinrich evaluated petitioner's application for the Port Canaveral position, petitioner's full name, Eugene Alfred Cavicchi, appeared on the application, indicating his gender. In addition, the application shows that respondents had employed petitioner since 1983, and that he had graduated from high

school in 1968 and college in 1972. Moreover, respondents provided the United States Attorney's Office with petitioner's EEO characteristics, which indicated his date of birth, 1950, and that he suffered from "kidney dysfunction disability." (*Cavicchi II*, Initial Br. at 56-57).

6. Having exhausted his administrative remedies, which were based on the accusatory activity of IA, petitioner filed a second lawsuit on June 30, 2003, followed local rules and filed a "Notice of Pendency of Other Actions." (*Cavicchi II*, Initial Br. at 3). However, Judge Martinez did not follow the rules by consolidating the claims. On September 3, 2003, the judge denied petitioner's disability discrimination claim. He also denied petitioner's age, and sex or gender claims because he was the "subject of an ongoing Internal Affairs investigation." The court referred to the IA investigation several times in its decision. It ignored both the FOIA documented evidence that the investigation had concluded in 1999, and the circumstantial chronological evidence, which showed that the alleged "ongoing Internal Affairs investigation" was a pretext under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The district court also stated that because petitioner was applying for a downgrade, the National Treasury Employees Union [NTEU] contract did not apply. It ignored petitioner's argument that he had applied for promotions. Regarding Quirk and the subsequent timing of respondents' accusatory activity, Judge Martinez ruled, "[A]lthough his allegations may chart chronologically such that they may have been motivated by a response to a protected activity, there is not even a scintilla of evidence that they were." (*Cavicchi I*, Corrected Br. at 32, 35-36).

7. The court of appeals (12a, 16a, 18a) did not address petitioner's right to prove that the IA investigation was a pretext for discrimination. (*Cavicchi I*, Corrected Br. at 19-20, 22, 30-31, 36-38). The court of appeals also engaged in fact-finding by adopting Quirk's account of the reasons she called petitioner's mother's doctor. (6-7a). The court also declined to remand and consolidate with the retaliation case. Adopting the Heinrich declaration and the district court's decision *in toto*, it went further: Although the issue of petitioner's ethnicity had never been raised in any pleading, the court of appeals identified him as "*an Italian-American male over 40*" (5a), . . . who was "*suspected* of participating in an official capacity in matters in which he had a conflicting financial interest and *in associating with* [non-existent] *persons connected to* [non-existent] *criminal activity*." (9a). (emphasis added). It ignored petitioner's right to show that the IA investigation had concluded in 1999, and that the IA investigation was a pretext. Likewise, despite respondents' letter (25a), it agreed with the district court that the NTEU contract did not apply to petitioner. (12a).

8. Former IA agent Leon Ives admitted that at the time the investigation had concluded, i.e., Report of Investigation No. 001, September 28, 1999, *the allegations against petitioner were "unsubstantiated"* (emphasis added). Although he had previously accused petitioner of wrongdoing on specific dates in 1996 and 1997, dates on which petitioner was either on sick leave, annual leave, or at another work location, Ives now claimed that the allegations of wrongdoing "were so general in nature . . . there was never a reason to verify any particular dates of employment with him because the allegations didn't define particular times that things happened." (*Cavicchi II*,

Initial Br. at 15). When asked what he did regarding petitioner's repeated allegations that petitioner's supervisor, Helen Calvit, had lied to IA, Ives claimed that he "wasn't in Internal Affairs." (Supplemental Br. at 13).

9. After a hearing on discovery in March 2004, the deciding judge in *Cavicchi II*, a United States magistrate judge, invited opposing counsel into chambers in front of petitioner and the undersigned. (Supplemental Br. at 8). There were no other parties to any other proceeding in the courtroom. Subsequently, respondents' attorney filed an amended consent to jurisdiction which allowed him to decide the case. *Id.* Later, opposing counsel actually put in writing that the judge invited her into chambers to view pictures of his investiture. *Ibid.* Although petitioner briefed this issue, the second panel did not address the appearance of impropriety and lack of impartiality in either its first decision, which this Court remanded, or in its November 13, 2006 opinion.

REASONS FOR ALLOWANCE OF THE WRIT

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), Justice Hugo Black wrote:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands

> that the agencies of public justice be not so important that they must always be mute and helpless victims of fraud.

This is the first case decided on remand to the Eleventh Circuit under *Burlington Northern*. Petitioner obeyed the order of the court of appeals "to file supplemental briefs addressing the impact of the Supreme Court case on this case." However, the court departed from this Court's remand order, its own briefing order, and entered a compromised judgment.

Retired Associate Supreme Court Justice Sandra Day O'Connor, on September 28, 2006, at Georgetown University Law Center, addressed the public discontent regarding the judiciary. She stated, "[t]here is a level of unhappiness that perhaps is greater than in the past and is certainly cause for great concern."[2] Judge William H. Pryor Jr. of the Eleventh Circuit Court of Appeals dissented, "[M]any who complain about criticisms of the judiciary concede that some criticism of judicial decisions is fair . . . Occasionally criticism of judicial decisions is essential to the progress of our constitutional republic . . .. [I]t is not too much for us to look in the mirror and ask whether criticisms are fair. . . . [W]e must depend upon the persuasiveness of our written opinions to command the respect of our fellow citizens. In that way, we have the

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[2] Fair and Independent Courts: A Conference on the State of the Judiciary. www.law.georgetown.edu/news/events/conference_story.html. *See also* Sandra Day O'Connor, *The Threat to Judicial Independence*. http://online.wsj.com/article/SB115931733674775033.html?mod=googlenews_wsj. September 27, 2006.

foremost responsibility of safeguarding our independence."[3] Petitioner submits that in this case, the Eleventh Circuit's decisions are unpersuasive.

The courts below appear not to have acted independently – one judge invited respondents' counsel into chambers allegedly to look at his pictures. Judge Jose E. Martinez, declared petitioner's discovery and summary judgment motions "moot," and did not consolidate the cases. The court of appeals also knew that he had appeared at respondents' Miami headquarters and accepted an "Outstanding American by Choice" performance award, which respondents posted on the Internet.[4] Petitioner filed this photo in the court of appeals.

Regarding the Eleventh Circuit Court of Appeals, this Court, in *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174 (2005) stated, "The Court of Appeals' conclusion that Title IX does not prohibit retaliation . . . ignores the import of our repeated holdings construing 'discrimination' . . . broadly." That decision should have enlightened the Eleventh Circuit regarding discrimination and retaliation.

In her Wall Street Journal article, Justice O'Connor reports a disturbingly injudicious statement by the chief justice of the Alabama Supreme Court, who "advised state judges to avoid following Supreme Court opinions 'simply

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[3] William H. Pryor Jr., *'Merely Judgment' America's courts are not above public criticism*, http://www.opinionjournal.com/forms/printThis.html?id=110009059. October 8, 2006.

[4] On October 30, 2006, Judge Martinez also gave the keynote address at respondents' "Observance of Hispanic Heritage Month and Disability Employment Awareness." In the publicly distributed flyer, respondents displayed the American flag at the bottom of the page and below the flags of 19 other countries.

because they are precedents.'" "[T]he liberals on the U.S. Supreme Court . . . looked down on the pro-family policies, *Southern heritage, evangelical Christianity, and other blessings of our great state.*" (emphasis added).

Judge Pryor did not state whether he rebuked the chief justice at the time he uttered those words, nor did he reveal his state of mind prior to the chief justice's defeat at reelection. Instead, he proclaimed that "Alabama [the Eleventh Circuit, formerly the Fifth Circuit] has come a long way since the days of Gov. Wallace standing in the schoolhouse door." *But see Jackson*, *supra*; *Ash v. Tyson Foods, Inc.*, 546 U.S. ___ (2006) (per curiam); *Boxer X v. A. Harris*, 437 F.3d 1107 (11th Cir. 2006), *reh'g en banc denied*, ___ F.3d ___, 2006 (11th Cir. Aug. 9, 2006), *petition for cert. filed* (U.S. Nov. 6, 2006) (No. 06-7654) (forcing a prisoner to masturbate is not cruel and unusual punishment).

In this case, the Eleventh Circuit stereotyped petitioner's ethnicity when it gratuitously identified him as "*an Italian-American male over 40*" (5a), . . . who was "*suspected* of participating in an official capacity in matters in which he had a conflicting financial interest and *in associating with* [non-existent] *persons connected to* [non-existent] *criminal activity*." (9a) (emphasis added).

In petitioner's case, the court of appeals' opinion defies logic. It partially applied *Burlington Northern* and its own precedent. Instead of also vacating its judgment regarding the first accusatory IA interview in 2001, the court vacated its decision only regarding the second accusatory IA interview in 2002. The first accusatory interview occurred shortly after petitioner filed an EEO complaint in 2001. The court also erroneously left intact its judgment regarding the

knowingly false criminal accusations and repeated derogatory and humiliating statements of petitioner's supervisor, Myra Quirk, whom respondents admitted violated the FMLA and who continued to retaliate.

When this Court rejected respondents' argument that petitioner's allegations were barred by *res judicata*, the court of appeals either should have reversed the first case or, relying on its precedent, should have granted petitioner's motion and referred the case to the first panel for reversal. It is this unpersuasive and questionable jurisprudence which causes dissatisfaction with the judicial system and is the reason that, instead of a court of *last resort*, this Court is becoming a court of *first resort*.

I. THE COURT OF APPEALS DID NOT FOLLOW THE SUPREME COURT'S REMAND ORDER BECAUSE IT IGNORED RESPONDENTS' KNOWINGLY FALSE CRIMINAL ALLEGATIONS, REPEATED DEROGATORY AND HUMILIATING STATEMENTS, AND RESPONDENTS' ADMISSION REGARDING THE SUPERVISOR'S CONDUCT.

A

It is undisputed that petitioner filed his first EEO complaint in 2001, after nearly 20 years of employment. In *Cavicchi II*, respondents' attorney admitted:

> [U]nfortunately the case began when prior to the filing of the first lawsuit when one of the Customs Employees, a supervisor of Mr. Cavicchi [Myra Quirk] contacted his mother's doctor. . . . And that situation sort of percolated and it was unfortunate because it is a violation of the Family and Medical Leave Act. . . . I respect the hurt

> that that caused Mr. Cavicchi. . . ." (Supplemental Br. at 9-10).

Respondents' agent, Myra Quirk, violated the FMLA, called petitioner's mother's doctor and, when challenged, subsequently falsely accused petitioner of filing falsified medical documentation. Respondents cannot produce any documents in support of these false criminal charges because there are none. (Supplemental Br. at 9-10). When petitioner learned of Quirk's call and her subsequent false criminal allegations against him, he reported her to IA. *Id.*

Although respondents cannot substantiate any of Quirk's false allegations in response to her violation of the FMLA, the court of appeals usurped the function of the jury when it found disputed material facts in favor of Quirk. This should have been reserved for a trier of fact, i.e., a jury – not Judge Martinez or the court of appeals.

In *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___ at 14, Justice Breyer wrote:

> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable.
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.
>
> * * *
>
> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe that this standard will screen out trivial conduct while effectively capturing those acts that are likely to

dissuade employees from complaining or assisting in complaints about discrimination. *Id.* at 15.

Therefore, respondents have conceded that petitioner is a reasonable worker and that he suffered a materially adverse action by Quirk, i.e., knowingly false allegations of misconduct. (Supplemental Br. at 10).

B

In 1998, petitioner's former supervisor, Helen Calvit, filed an affidavit (Supplemental Br. at 12-13), making false misconduct allegations against him, which allegedly occurred in 1996 and *July-August* 1997. *Id.* In fact, he was assigned to the Miami Seaport and no longer under her supervision when she made these allegations regarding the Vehicle Export Station [hereinafter VES]. Petitioner had left the VES in *June* 1997. *Ibid.* However, petitioner was unaware of these false allegations until three years later – after he filed an EEO complaint in 2001. *Ibid.*

Subsequently, respondents claimed that the Calvit affidavit upon which IA based its "lengthy and ongoing Internal Affairs investigation" was "inadmissible hearsay" and "stale." (Supplemental Br. at 13).

The Supreme Court stated, "[T]he anti-retaliation provision, unlike the substantive provision [anti-discrimination provision], is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___ at 9 (2006) (internal citation omitted). (Supplemental Br. at 11).

In petitioner's case, the IA investigation had concluded and a final report was written in 1999; however,

once petitioner filed his EEO complaint, respondents "un"concluded and "un" reported the investigation in order to justify the denial of career opportunities, desired transfers, made knowingly false allegations of malfeasance and facts amounting to extortion (Supplemental Br. at 11-12), and falsely claimed that he was the subject of an "ongoing Internal Affairs investigation." Respondents refused to interview Helen Calvit regarding her false charges. Instead, they coordinated their accusatory activity with the timing of petitioner's protected EEO activity, i.e., by falsely accusing him within two to three weeks after he filed an EEOC complaint in 2001 (first IA interview), appeared at his workplace, repeated the allegations, and challenged him to a polygraph (second IA interview). This occurred eighteen months later (August 2002), during management depositions (including Quirk), and issued *another* final report on October 1, 2002 – the same day of court ordered mediation. *Id.*

This Court recognized:

> [A]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. See, *e.g., Rochon v. Gonzales,* 438 F.3d, at 1213 (FBI retaliation against employee 'took the form of FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife'); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (C.A. 10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). *Burlington Northern* at 8-9 (emphasis in original).

At his deposition in 2004, IA agent Leon Ives, who conducted the first accusatory IA interview, admitted that [Calvit's] allegations were "unsubstantiated" on September 28, 1999, i.e., the date the IA investigation "had concluded." (Supplemental Br. at 13). Although petitioner repeatedly told IA that Calvit had lied and challenged her to a polygraph, IA neither investigated nor interviewed Calvit. *Ibid.* When asked what he did about petitioner's repeated allegations that Calvit (and Ryan[5]) had lied, Ives claimed he "wasn't in Internal Affairs." *Ibid.* On every date of Calvit's false charges, petitioner was either on annual leave, sick leave or assigned to another work location – translating for a Haitian diplomat. *Ibid.* In fact, on one of the dates of Calvit's false charges of misconduct, he was actually translating for a Haitian Diplomat at the Customs Management Center, for which he received a commendation. *Ibid.*

Petitioner told IA:

> [I]'ve been accused of false allegations by Internal Affairs. [Y]ou've ruined my life. I've applied for jobs. I don't know I'm under investigation, five years after I leave the vehicle export station, you come back at me after I file an EEO complaint against Myra Quirk. [I]'ve been on the job almost 19 and half years. I've never had my integrity questioned until I file an EEO complaint against Myra Quirk and the Customs Service for discrimination. (Supplemental Br. at 17).

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[5] In truth, Ryan made no such allegations. IA did not interview him until August 2002. "Mr. Cavicchi knew and sometimes complained of Mr. Gant. Mr. Cavicchi treated everybody the same. He was very helpful to people that spoke French or Creole because he liked to practice his french [sic]." (Supplemental Br. at 13).

Petitioner also testified at his deposition:

> [I]f Internal Affairs Agents Gordon and Ives had done their research, had done their jobs, they would have arrested Helen Calvit for perjury . . . to have Crane and Butler come down here and ask me the same questions over something over which I had proven on the dates of my alleged illegal activities, I was either on annual leave, I was on sick leave, or I was translating at the CMC for a Haitian Diplomat. *Ibid.*

* * *

Adding insult to injury, when Port Director Ruby Hogan learned of his second application for a promotion to the CMC (GS-12/13), she demeaned him in the presence of Quirk, "I don't want you up there telling us what to do." Quirk further insulted him, "You're not qualified, you never wrote anything for Customs." (Supplemental Br. at 20). In truth, petitioner had written a post 9/11 directive which is now part of Customs policies, "someone plagiarized my ideas and got credit for it, probably got a lot of money. . . ." *Ibid.* "[I] would have taken . . . a $15,000.00 pay cut to get away from Myra Quirk." *Ibid.* Quirk also told a coworker that she planned to have petitioner demoted. *Ibid. See Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (finding actionable repeated derogatory or humiliating statements). *Burlington Northern* at 5. (Supplemental Br. at 18).

II. RESPONDENTS ALSO RETALIATED IN THE CONTEXT OF THE ACCUSATORY INTERNAL AFFAIRS INTERVIEW THEY CONDUCTED IN 2001 BECAUSE THE DOCUMENTS THEY WITHHELD PROVE THAT THE IA INVESTIGATION CONCLUDED IN 1999.

"No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals, *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174 (2005)." *Burlington Northern* at 4. Respondents also discriminated and retaliated against petitioner in the context of the so-called "ongoing Internal Affairs investigation" which it "un"concluded and purported to undertake in 2001.

Respondents are unable to justify their conduct and failure to follow their rules regarding IA investigations. The rules required IA to conduct investigations expeditiously and to enter information in the computerized tracking system every 45 days with an explanation "detailing the reason for the delay." (Supplemental Br. at 20-23). The agency did not explain its reasons for non-compliance.

David Mark Conrad, associate professor of criminal justice, Troy State University and former Supervisory Criminal Investigator, Resident Agent-in-Charge, Customs Internal Affairs, was responsible for internal integrity investigations and security for a nine-state area and Acting National Director of Training for U.S. Customs, Office of Internal Affairs. At his deposition, Conrad testified regarding the manner by which investigations are conducted: first, determine the viability of the allegations; second, determine whether the individual is at the location. This is done by examining the TECSII system. (*Cavicchi II*, Initial Br. at 47). Mr. Conrad also testified, "I

find it hard to accept the number of coincidences as far as timing that have occurred in this case . . . After spending 27 years as a criminal investigator for the Customs Service, it does not pass the smell test." Conrad also stated that the investigation of petitioner was "basically open and closed, done with on September 28, 1999." He also stated that it "is beyond my comprehension that it's anything but a direct result of . . . his filing of the EEO complaint." *IA could have verified the truth or falsity of the allegations in* "Literally minutes," *by going into the TECSII System. Id.* at 18-19. Mr. Conrad also compared the second accusatory IA interview to the first accusatory IA interview:

> Mr. Cavicchi had repeatedly offered to take a polygraph and the others to take polygraphs and resolve this one way or the other early on, and the agency declined it, somewhat of a surprise. [V]ery much like the March 21, 2001 interview was when Marwell . . . asked Gene to come in for the purpose . . . of . . . a close-out interview . . . the inquisition started when he got there. (Supplemental Br. at 16-17).

Sheila White also underwent a retaliatory investigation but was compensated. *Burlington Northern* at 17. However, even after the false allegations against petitioner were thrice deemed "unsubstantiated," and an arbitrator found that he was illegally vetted (25a), respondents never made him whole – he was not given a desired transfer and was never retroactively promoted to a GS-12/13. In addition, his life and career were destroyed. As the Supreme Court stated, "Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . damages concluding that the additional remedies were necessary to " 'help make victims whole.' " *Ibid.* (Supplemental Br. at 18-19).

III. BECAUSE THE COURT OF APPEALS CORRECTLY VACATED ITS JUDGMENT REGARDING THE 2002 ACCUSATORY IA INTERVIEW, IT SHOULD ALSO HAVE VACATED ITS JUDGMENT REGARDING THE 2001 ACCUSATORY IA INTERVIEW BECAUSE OF THE CLOSE TEMPORAL PROXIMITY OF RESPONDENTS' KNOWINGLY FALSE CRIMINAL ALLEGATIONS AT THAT INTERVIEW.

In *Burlington N. & S. F. R. Co. v. White*, 548 U.S. at 7, 9, 12, Supreme Court rejected the United States' argument and held that Title VII's anti-retaliation provision is not to be read *in pari materia* with its anti-discrimination provision and is not coterminous.

Because the court of appeals correctly vacated the judgment regarding the August 30, 2002 accusatory IA interview, it should also have vacated the judgment regarding the March 21, 2001 accusatory IA interview.

In *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (per curiam), the Supreme Court stated:

> The cases that accept mere temporal proximity between an employer's knowledge and adverse employment action as sufficient evidence of causality to establish a *prima facie* case hold that the temporal proximity must be "very close" *O'Neill v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001). *See e.g., Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period . . . 90 days . . . insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all. *Id.* at 273-274.

Although the court of appeals applied this Court's precedent and its precedents regarding the causal connection and temporal proximity with regard to the second accusatory IA interview in 2002, it did not explain the reason it did not apply the same precedents regarding the first accusatory IA interview in 2001. In *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999), the court held that a time period of seven weeks was sufficiently proximate to create a causal nexus for purposes of establishing a *prima facie* case. In *Farley*, the court accepted 52 days as showing "temporal proximity." In petitioner's case, the first accusatory IA activity occurred within two to three weeks (14-21 days) after he filed his discrimination complaint in 2001. *See also Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (three months sufficient to establish temporal proximity).

IA Agent Sherrie Gordon also conducted the first accusatory IA interview on March 21, 2001, which occurred nearly seventeen months after the IA investigation had concluded and had been reported in October 1999, and within two to three weeks of petitioner's filing his discrimination complaint. Five days after IA concluded and reported its investigation in 1999, on October 5, 1999, the Office of Internal Affairs notified petitioner that he passed his high risk periodic reinvestigation, i.e., an updated background investigation.

Respondents proffered the perjured[6] testimony of IA agent Gordon, who was deposed in 2004. When asked

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[6] *See* The Starr Report, The Official Report of the Independent Counsel's Investigation of the President, Forum (1998), 311 n.3. "[W]e categorically reject any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals" (citations omitted) (*Cavicchi II*, Initial Br. at 13-14 n.8).

what she did from September 28, 1999 until the March 21, 2001 interview of petitioner, Gordon answered, "[T]he other subjects in the investigation, their concluding reports were in the process of being written." When asked what she did regarding petitioner, she stated, "Nothing. . . . There was nothing left to do." (Supplemental Br. at 5-6). In truth, on October 1, 1999, she wrote a closing report referencing the *final report* regarding petitioner. *Id.* Respondents now claim this referenced final report does not exist. (Supplemental Reply Br. at 6).

Respondents misled the first panel (Black, Barkett, Hull) into believing that the IA investigation into petitioner was "long term." (9a). The court stated:

> [T]he IA report indicates that agents interviewed Cavicchi on March 21, 2001, and again on August 30, 2002, but did not indicate that any steps had been taken in the investigation between November of 1998 [sic] and March of 2001. (9a; Supplemental Br. at 5).

By withholding documents, respondents misled the courts into believing that there had been an "ongoing Internal Affairs investigation" into petitioner. In truth, the IA investigation had concluded and a final report was written on October 1, 1999. IA notified petitioner that he had passed his "high risk public trust reinvestigation," i.e., updated background investigation five days later. Moreover, on the day she wrote the *final report*, October 1, 1999, Gordon left IA. (Supplemental Br. at 6).

Gordon also specifically denied she wrote a report after the March 21, 2001, interview, claiming she was "no longer assigned to the Office of Internal Affairs," only to have a report later surface that she had actually reported

the allegations as "unsubstantiated." *Ibid.* She also admitted that she had recently altered her notes regarding a February 7, 1997 interview of petitioner. *Ibid.*

Quirk, the respondents, and IA knew that that petitioner had reported Quirk to IA and lodged a complaint. Retaliating, Quirk falsely claimed that petitioner had filed falsified medical documentation and continued to retaliate; IA knew in 2001-2002 that it had already concluded its investigation on September 28, 1999, reported the results of its investigation on October 1, 1999, and provided petitioner with his favorable periodic reinvestigation five days later. Marwell, the Agent-in-Charge, knew that he had approved the 1999 final report referencing IA's final report of investigation regarding petitioner. (Supplemental Reply Br. at 6-7). However, the respondents refused to produce the final report of investigation. *Id.*

Respondents coordinated their activity, beginning with the assertion of and pursuit of petitioner's legal rights, i.e., the complaint against his supervisor and the filing of the EEO complaint in March 2001; during management depositions in August 2002; and on the same date of court ordered mediation on October 1, 2002. Furthermore, IA offered no explanation why it did not follow its own rules and "un" concluded an investigation it had already concluded and reported in 1999. (Supplemental Br. at 11-12).

IV. BECAUSE OF RESPONDENTS' MISCONDUCT IN THE COURTS BELOW AND BECAUSE THE SUPREME COURT REJECTED THEIR ARGUMENT THAT PETITIONER'S CLAIMS WERE BARRED BY *RES JUDICATA*, AND SINCE THE COURT OF APPEALS DEPARTED FROM PRECEDENT, THE SUPREME COURT SHOULD ALSO REVERSE THE JUDGMENT IN PETITIONER'S FIRST CASE.

On June 30, 2006, this Court rejected respondents' only argument in opposition to the petition for writ of certiorari – *res judicata*.

Because the court of appeals had previously allowed respondents' motion in *Cavicchi II* to supplement the record with *Cavicchi I*, petitioner, on remand, filed a motion to have the first panel decide the case. Petitioner also briefed this issue. (Supplemental Br. at 3-8). Under Eleventh Circuit precedent, one panel cannot reverse another panel. *Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003).

Respondents neither opposed this motion nor responded to petitioner's argument. Instead, respondents reargued that which they unsuccessfully argued in this Court. (Supplemental Br. for the United States at 7-10) and attached their Brief of Respondents in Opposition to Certiorari, their prior brief in the court of appeals, and the first panel's decision in *Cavicchi I*.

Although the respondents withheld documents which prove that the so-called "ongoing Internal Affairs investigation" was a fabrication, without stating a reason, the court of appeals denied the motion and left the first case intact. (2a n.1).

Petitioner submits that the reason the court of appeals did not vacate its judgment regarding the first accusatory IA interview in 2001 is that a landslide of truth would have resulted – it would have been forced to admit that respondents had engaged in a sham defense, had perpetrated a fraud upon the court, and withheld documents which proved that the IA investigation was also pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The court of appeals either should have reversed petitioner's first case or should have allowed the motion to have the first panel decide the case.

CONCLUSION

Therefore, the Supreme Court should grant the petition and reverse the judgment in *Cavicchi II* with regard to the first accusatory IA interview, the knowingly false criminal accusations, and the repeated derogatory remarks of petitioner's supervisor. The Court should also reverse the judgment in *Cavicchi I*.

Respectfully submitted,

JOHN CAVICCHI
Counsel of Record
5 Island Ave. #6d
Miami Beach, FL 33139-1339
(305) 531-3416

Attorney for Petitioner

2006 WL 3257880

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11065
Non-Argument Calendar

D.C. Docket No. 03-21764-CV-JEM

EUGENE CAVICCHI,

Plaintiff-Appellant,

versus

HOMELAND SECURITY SECRETARY, Michael Chertoff, and the United States Department of Homeland Security by and through the Bureau of Customs and Border Protection,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(November 13, 2006)

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before TJOFLAT, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:

The Supreme Court vacated the judgment of this court in this case and remanded the case to this court for further consideration in light of *Burlington Northern & Santa Fe Rilway Co. v. White*, 548 U.S. ___ (2006). Upon reconsideration, we vacate the judgment of the district court pertaining to Cavicchi's August 2002 Internal Affairs interview and remand to the district court for reconsideration in the light of *Burlington*.

AFFIRMED in PART, VACATED in PART, and REMANDED.[1]

[1] Appellant's motion to transfer this case to the panel that decided *Cavicchi I* is denied.

APPENDIX B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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August 10, 2006

John Cavicchi
Attorney at Law
5 ISLAND AVE APT 6D
MIAMI BEACH, FL 33139-1364

Appeal Number: 05-11065-FF
Case Style: Eugene Cavicchi v. Homeland Security Sec.
District Court Number: 03-21764 CV-JEM

The following action has been taken in the referenced case:

This court's November 14, 2005, opinion was vacated by order of the Supreme Court, and the case was remanded to this court for further consideration in light of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405 (June 22, 2006).

The parties are directed to file supplemental briefs addressing the impact of the Supreme Court case on this case. Appellant's brief shall be due 30 days from this date. Appellees' brief shall be due 30 days thereafter. Appellant may file a reply within 14 days. The briefs shall not exceed 25 pages.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Marcus Simmons (404) 335-6175

APPENDIX C

Supreme Court of the United States

No.

05-770

EUGENE CAVICCHI,

Petitioner

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response hereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for a writ of certiorari is granted, and the judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___ (2006).

IT IS FURTHER ORDERED that the petitioner Eugene Cavicchi recover from Michael Chertoff, Secretary of Homeland Security, et al., Three Hundred Dollars ($300.00) for costs herein expended.

June 30, 2006

Clerk's costs: $300.00

2004 WL 4917357

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-10451
Non-Argument Calendar

D.C. Docket No. 01-03406-CV-JEM

EUGENE CAVICCHI,

Plaintiff-Appellant,

versus

SECRETARY OF TREASURY OF THE UNITED STATES OF AMERICA, Paul H. O'Neil, UNITED STATES CUSTOMS SERVICE,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(OCTOBER 15, 2004)

Before BLACK, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Eugene Cavicchi, an Italian-American male over 40 years of age who suffers from a kidney malfunction, appeals the district court's grant of summary judgment in favor of his employer, the United States Customs Service ("USCS") in his suit raising various employment law claims. After review, we affirm.

I. BACKGROUND

In 1983, Cavicchi began working for the USCS as a data transcriber, a GS-2 position.[1] In 1990, after a series of promotions, Cavicchi obtained a GS-11 position as senior inspector. In 1997, Cavicchi switched to a reduced-hours schedule due to a kidney disorder.

A. Cavicchi's FMLA Requests and Interactions with Myra Quirk

In the summer of 1999, Cavicchi requested, and received, unpaid leave under the Family and Medical Leave Act ("FMLA") to care for his mother, who suffered from cardiomyopathy, a degenerative heart condition.

On May 9, 2000, Cavicchi filed an additional request for three months of unpaid leave to care for his mother. In support of this request, Cavicchi attached an unsigned letter from his mother's cardiologist, Dr. Stafford Cohen, dated May 5, 1999. Myra Quirk, Cavicchi's second-level supervisor at USCS, asked Cavicchi to provide more current documentation of his mother's medical condition. Cavicchi then submitted a facsimile copy of a second letter from Dr. Cohen. The body of the second letter was identical to the body of the first letter, except the date read "May 17, 2000" and included a signature.

In an affidavit, Quirk stated that because the second letter contained identical text to the first letter and was

[1] The USCS previously was part of the Department of Treasury. During the course of this litigation, the USCS became the Bureau of Immigration and Customs Enforcement, part of the newly created Department of Homeland Security. For the sake of simplicity, we refer to the defendant as the USCS.

not original, she did not believe that the letter was sufficient to support Cavicchi's FMLA request. Quirk then called Dr. Cohen's office "to verify that someone from the office had signed and dated the doctor's letter." An employee at Dr. Cohen's office indicated that she had indeed changed the date and signed Dr. Cohen's name. Dr. Cohen also personally verified that Cavicchi's request for three months of leave was appropriate. Quirk then granted Cavicchi's FMLA leave request.

In a letter dated June 6, 2000, John Cavicchi, plaintiff Cavicchi's brother, complained to Commissioner of Customs Raymond Kelly about Quirk's phone call to Dr. Cohen. Assistant Commissioner William Keefer responded in writing to John Cavicchi stating that, "[t]he concerns noted in your letter have been taken seriously, and have been provided to the appropriate office within the Office of Internal Affairs for appropriate action."

In November 2000, another incident occurred between Quirk and plaintiff Cavicchi. In his deposition, Cavicchi testified that Quirk instructed him to answer the phone, but he refused, explaining that he was on his lunch break. Quirk then asked Cavicchi to report to her office, but Cavicchi refused to speak to Quirk alone, indicating that he had an FMLA complaint pending against her.

In January of 2001, a third incident occurred. At that time, Quirk assigned an inspector other than Cavicchi to "process inboards for two weeks." Cavicchi testified that, when Quirk was asked about this decision by the inspector who was assigned to the task, Quirk explained that Cavicchi "did not get along with the importing public."

B. Port Canaveral Inspector Position

On May 24, 2000, a position opened for a GS-5/7 part-time customs inspector in Port Canaveral, Florida, and Cavicchi applied for the position. In October 2000, Cavicchi sent a letter to Raymond Kelly, Commissioner of Customs, expressing concern that he had not been awarded the position and transferred to Port Canaveral. Cavicchi's letter stated, in relevant part:

> I have learned that two rookie inspectors from Montana are already on site. I called the Cape Canaveral Port Director with whom I've worked for thirteen years in Miami. Both he and the Tampa CMC told me I was their first choice. I called Washington and had difficulties ascertaining that I was on the "approval list." I do not understand why I am not yet assigned to Port Canaveral. To my knowledge there is nothing derogatory in my background. I believe I am a conscientious and loyal employee of the government.

In a letter dated December 8, 2000, Assistant Commissioner Bonni Tischler responded to Cavicchi, stating that Cavicchi's name was "included on the recommendation list for the Port Canaveral position."

Ultimately, Cavicchi was not selected for the position. Jeffrey Baldwin, Director of Field Operations for the North Florida Customs Management Center, stated in an affidavit that he was the recommending official for the Port Canaveral position. Baldwin recommended three applicants for the position, Nicole La Mora, Marty Jo Zeis, and Cavicchi. John Heinrich, Acting Assistant Commissioner for the Office of Field Operations, was the selecting official for the position. In an affidavit, Heinrich stated that, at the time of the selection, he "did not know Mr. Cavicchi

and had no knowledge of his age, gender, race or alleged disability." Heinrich's affidavit further indicated that he selected La Mora and Zeis as the most qualified applicants because they "possessed the best knowledge, skills, and experience for these positions."[2] Additionally, Heinrich stated that he selected them because they "cleared an expanded background check." Cavicchi, on the other hand, was not selected "because he did not clear the expanded background check since he was the subject of an ongoing Internal Affairs . . . investigation."

Internal Affairs ("IA") initiated an investigation into allegations against Cavicchi. An IA investigation report dated October 1, 2002, indicated that Cavicchi had been suspected of participating in an official capacity in matters in which he had a conflicting financial interest and in associating with persons connected to criminal activity. The report also indicated that the investigation was "long term" and that "[s]everal employees became subjects of the investigation." Further, the IA report indicated that agents interviewed Cavicchi on March 31, 2001, and again on August 30, 2002, but it did not indicate that any steps had been taken in the investigation between November of 1998 and March of 2001. The report also indicated that the allegations against Cavicchi were found to be unsubstantiated.

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[2] La Mora's application indicated that she graduated from Ohio State University with a degree in Animal Science and that she spent approximately two years as a customs inspector in Sweetgrass, Montana. Zeis's application is not in the record. Both La Mora and Zeis are white females.

C. Cavicchi's EEO Complaint and Lawsuit

On February 25, 2001, Cavicchi filed an EEO complaint alleging that he was denied the part-time Port Canaveral position based on age, sex, and disability discrimination. Additionally, he stated that he was subjected to "harassment from Chief Inspector."

On July 12, 2002, Cavicchi filed a second amended complaint alleging (1) race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*; (2) age discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*; (3) disability discrimination in violation of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*; (4) a violation of the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* as a result of Quirk's inquiry to Dr. Cohen about Cavicchi's leave request; and (5) retaliation.

On September 3, 2003, the district court entered summary judgment in favor of the USCS on all of Cavicchi's claims. On September 10, 2003, Cavicchi filed a motion to alter or amend the judgment, alleging that there was newly discovered evidence that suggested that the USCS obtained summary judgment by the perpetration of a fraud upon the district court. In support of his allegation, Cavicchi attached his IA investigation report and a declaration by David Mark Conrad, a former supervisor within IA.

II. DISCUSSION

A. Age and Gender Discrimination Claims

A plaintiff may establish employment discrimination by presenting either direct or circumstantial evidence of discrimination. *See, e.g., Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).[3] In cases where there is no direct evidence of discrimination, this Court applies the *McDonnell Douglas* framework to age discrimination and gender discrimination cases. *See Pennington v. City of Huntsville,* 261 F.3d 1262, 1269 (11th Cir. 2001).

To establish a prima facie case of gender discrimination under Title VII, a plaintiff must show that: (1) he is a member of the protected class, (2) he was subject to an adverse employment action, (3) his employer treated similarly situated employees outside his classification more favorably, and (4) he was qualified to do the job. *See Hinson v. Clinch County, Ga. Bd. of Educ.,* 231 F.3d 821, 828 (11th Cir. 2000). To establish a prima facie case under the ADEA, a plaintiff must show that: (1) he was a member of the protected class; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the position from which he was discharged; and (4) he was qualified to do the job for which he was rejected. *Damon v. Fleming Supermarkets of Fla., Inc.,* 196 F.3d 1354, 1359 (11th Cir. 1999).

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[3] Cavicchi's claim that the district court required him to produce direct evidence of discrimination is meritless. The district court properly applied the *McDonnell Douglas* burden-shifting framework, which allows a plaintiff to prove discrimination through indirect evidence. Further, Cavicchi's claim that he presented direct evidence is meritless, and we do not discuss it further.

Once the plaintiff establishes a prima facie case, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) (age discrimination); *Hinson,* 231 F.3d at 830 (gender discrimination). If the employer does so, the plaintiff must demonstrate that the employer's proffered reason is a pretext for discrimination. *See Watkins v. Sverdrup Tech., Inc.,* 153 F.3d 1308, 1314 (11th Cir. 1998) (age discrimination); *Hinson,* 231 F.3d at 830 (gender discrimination).

Even assuming, as the district court did, that Cavicchi presented a prima face case for age and gender discrimination, he did not show that the USCS's proferred reason for his non-selection – that he failed to pass an expanded background investigation – was a pretext for discrimination.

To show pretext, Cavicchi points to a the National Treasury Employee Union ("NTEU") contract with the USCS. The contract states in relevant part:

> The fact that an employee is the subject of a conduct investigation will not prevent or delay a *promotion* that otherwise would be made except that the Employer may postpone the *promotion* where the allegations under investigation bear a direct relationship to employee performance.

(Emphasis added).

Cavicchi appears to argue that this provision proves that the USCS's legitimate non-discriminatory reason is false because it violates the NTEU contract. However, the part-time, Port Canaveral position that Cavicchi sought was not a promotion. If Cavicchi had received the assignment, he would have moved from a GS-11 to a GS-5/7

grade. Thus, this contractual provision is inapplicable to Cavicchi's situation, and does not make the USCS's legitimate non-discriminatory reason false or pretextual.

Cavicchi also presented evidence that the duration of the IA investigation – the pendency of which cost him the Port Canaveral position – was unusually long. In his affidavit, former supervisor Conrad stated that he was "particularly concerned with the apparent length of time it took for IA to deal with the claimed allegations against [Cavicchi]." However, Cavicchi failed to present any evidence that the length of the IA investigation was motivated by his gender or his age, and not some permissible, non-discriminatory factor. *See Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1187 (11th Cir. 1984) ("Although WLCY's decision to fire Nix, and its refusal to reconsider that decision might seem unfair or even 'incredible' to outside observers, Nix cannot prevail in his Title VII action for he has not established discriminatory intent."). Thus, the district court properly granted summary judgment to the USCS on Cavicchi's claims for age and gender discrimination.[4]

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[4] Cavicchi's hostile work environment claim is based on allegations that Quirk (1) questioned his request for FMLA leave, (2) told him to answer the phone during his lunch break, and (3) told a third party that she believed Cavicchi did not get along well with the public. Even assuming these allegations are true, they do not rise to the level of a hostile work environment. *See, e.g., Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1245 (11th Cir. 1999) (*en banc*). Thus, the district court properly granted summary judgment in favor of the USCS on this claim.

B. Disability Discrimination Claim

"The Rehabilitation Act (the Act) prohibits federal agencies from discriminating in employment against otherwise qualified individuals with a disability." *Sutton v. Lader,* 185 F.3d 1203, 1207 (11th Cir. 1999) (citation omitted). "To establish a prima facie case of discrimination under the Act, an individual must show that (1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Id.*

We conclude that even if Cavicchi could show that he had a disability and that he was otherwise qualified for the position, he is unable to show that he was subjected to unlawful discrimination as a result of his disability.[5] As discussed above, the USCS proferred a legitimate non-discriminatory reason for denying Cavicchi the Port Canaveral position and Cavicchi has failed to show that the reason was a pretext for discrimination. Moreover, in his affidavit, Heinrich stated that he did not know about Cavicchi's kidney disorder when he made his selections for the Port Canaveral position.

C. Retaliation Claim Under Title VII

Title VII makes it unlawful for an employer to retaliate against an employee because the employee "has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge,

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[5] The district court expressed doubt that Cavicchi's kidney disease rose to the level of a "disability" under the Rehabilitation Act. We need not decide that issue, and assume for the purposes of this opinion that he was able to meet that element of a claim for disability discrimination.

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e-3(a). "To establish a prima facie case of retaliation, a plaintiff must show that (1) [he] engaged in protected activity, (2) [he] suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action." *Stavropoulos v. Firestone,* 361 F.3d 610, 616 (11th Cir. 2004).

"To be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must 'meet some threshold level of substantiality.'" *Stavropoulos,* 361 F.3d at 616-17. Ultimate employment decisions include decisions such as termination, failure to hire, or demotion. *Id.* at 617. The reprimand of an employee does not constitute an adverse employment action when the employee suffers no tangible harm as a result. *See Pennington,* 261 F.3d at 1267; *see also Davis v. Town Lake Park, Fla.,* 245 F.3d 1232, 1241-42 (11th Cir. 2001).

To establish the causal connection required by the third prong, the plaintiff must show that: (a) "the decision makers were aware of the protected conduct"; and (b) "the protected activity and the adverse action were not wholly unrelated." *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 590 (11th Cir. 2000) (internal quotations and brackets omitted). Close temporal proximity may be sufficient to show the protected activity and the adverse action were not wholly unrelated. *Id.*

In this case, there is no evidence that plaintiff Cavicchi engaged in activity protected by Title VII until February 25, 2001, the date on which he filed his EEO complaint. Thus, because Cavicchi did not engage in

protected activity until after his non-selection for the Port Canaveral position, there can be no causal connection between protected activity and his non-selection for that position.

Further, while Cavicchi did present evidence that he was interviewed by IA officers shortly after filing his EEO complaint, he has not shown that this interview constituted an "adverse employment action" within the meaning of Title VII. The IA interview did not constitute an "ultimate employment decision" because it did not result in termination, loss of pay or reduction in benefits. *See Stavropoulos,* 361 F.3d at 617. Moreover, even if the interview was tantamount to reprimand, a reprimand that does not result in tangible harm to an employee does not constitute an "adverse employment action" within the meaning of Title VII. *See Pennington,* 261 F.3d at 1267; *Davis,* 245 F.3d at 1241-42. Thus, because Cavicchi did not present evidence that he suffered any "adverse employment action" after filing the EEO complaint, the district court did not err in granting the USCS summary judgment on Cavicchi's Title VII retaliation claims.

D. FMLA Retaliation Claim

Cavicchi argues that the district court erred by not addressing his FMLA claim that the USCS violated 5 U.S.C. § 6385, which forbids retaliation against employees who request leave under Title II of the FMLA. We agree the district court should have addressed it, but affirm because there is no right of private action under 5 U.S.C. § 6385 of Title II of the FMLA.

Title I of the FMLA applies to private sector employees. *See* 29 U.S.C. § 2611(2)(B)(I). Conversely, "most

employees of the federal government to whom the FMLA applies, . . . are governed by Title II of the FMLA." *Mann v. Haigh,* 120 F.3d 34, 36 (4th Cir. 1997); *see* 5 U.S.C. §§ 2105(a)(1)(A), (a)(1)(D) and 6301(2) (providing a series of definitions for the term "employee" as used in Title II of the FMLA). Title I expressly creates a right of action for private employees, *see* 29 U.S.C. § 2617(a)(2); however, Title II does not contain an analogous provision, *see* 5 U.S.C. §§ 6381-6387.

Although this Court has never addressed the issue of a right of action for federal employees under Title II of the FMLA, the Ninth and Fourth Circuits both have held that federal employees may not bring suits based on FMLA violations. *Russell v. United States Dep't of the Army,* 191 F.3d 1016, 1019 (9th Cir. 1999) ("[T]he absence of an express waiver of the government's sovereign immunity in Title II of the FMLA bars private suits for violations of its provisions."); *Mann,* 120 F.3d at 37 ("No unequivocal waiver of immunity exists in Title II, and, consequently, the omission of a provision in Title II similar to that in Title I creating a private right of action is treated as an affirmative congressional decision that the employees covered by Title II of the FMLA should not have a right to judicial review of their FMLA claims through the FMLA."). We agree with these circuits that the absence of an express authorization precludes Cavicchi's FMLA claim for retaliation because the United States Supreme Court has held that the sovereign immunity of the United States may only be waived through an "unequivocal" expression of Congressional intent to do so. *See, e.g., Franconia Assocs. v. United States,* 536 U.S. 129, 141, 122 S.Ct. 1993, 2001 (2002).

Accordingly, we affirm the grant of summary judgment on Cavicchi's FMLA claim for retaliation.

E. Motion to Alter or Amend the Judgment

Finally, plaintiff Cavicchi argues that the district court erred by denying his motion to alter or amend its order granting summary judgment to the USCS. Cavicchi contends that, despite his efforts to compel discovery, he did not receive a copy of the "IA investigation 001" until just before the district court ruled on summary judgment. Cavicchi acknowledges that he filed the IA report with the district court on August 20, 2003, and the district court's decision was dated September 3, 2003, but argues that the district court had "already made up its mind" when he filed the document.[6]

This Court reviews the denial of a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e) for abuse of discretion. *See Mincey v. Head,* 206 F.3d 1106, 1137 (11th Cir. 2000). "It is not an abuse of the court's discretion to deny a Rule 59(e) motion that requests an amendment that relates to a matter that could have been raised before the judgment was entered." *Id.* at 1137 n.69.

Here, Cavicchi not only had the opportunity to file the IA report prior to the entry of summary judgment, he did so. Moreover, the district court indicated in its order denying the Rule 59(e) motion that "all relevant evidence was before the Court" when it decided the summary

[6] Cavicchi relies on the fact that the date of the district court's order is typewritten as "August, 2003." However, that typewritten date was crossed out and "Sept" was written in its place.

judgment motion. Thus, the district court did not abuse its discretion by denying Cavicchi's Rule 59(e) motion.[7]

III. CONCLUSION

For the foregoing reasons, we conclude that the district court properly granted summary judgment in favor of the USCS on all of Cavicchi's claims, and did not abuse its discretion in denying Cavicchi's Rule 59(e) motion.

AFFIRMED.

[7] Cavicchi has abandoned any claim that the district court abused its discretion by denying his Federal Rule of Civil Procedure 60(b) motion because his initial brief contains no argument on this isssue. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (stating that, to preserve an issue on appeal, an appellant must devote a discrete, substantial portion of his argument to that issue).

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-11065-FF

EUGENE CAVICCHI,

Plaintiff-Appellant,

versus

HOMELAND SECURITY SECRETARY,
Michael Chertoff, and the United States Department
of Homeland Security by and through the
Bureau of Customs and Border Protection,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON REMAND FROM THE
UNTIED STATES SUPREME COURT

(Filed Jan. 17, 2007)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, ANDERSON and DUBINA, Circuit Judges.

PER CURIUM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX F

Title VII of the Civil Rights Act of 1964 made it an unlawful employment practice:

> [F]or an employer . . . to discriminate against any individual . . . , because of such individual's race, color, religion, sex, or national origin."

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) contains an anti-retaliation provision, forbidding employers from retaliating or from taking adverse personnel action against employees, who exercise their lawful and protected rights under Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

The Civil Rights Act of 1991 establishes an alternative for proving that an "unlawful employment practice" has occurred:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2m.

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 *et seq.*, 633a prohibits discrimination because of age in the Federal Government. **Section 631(b)** states:

> In the case of any personnel actions affecting employees . . . the prohibitions of this title shall be limited to individuals who are at least 40 years of age.

The Family Medical Leave Act of 1993 (FMLA), Title II, 5 U.S.C. § 6318 *et seq.* provides for leave for a federal employee:

> [A]n employee shall he entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (C) "In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition."

***Id.* § 6382.**

> An employing agency may require that a request for leave . . . be supported by certification issued by the health care provider of the . . . parent of the employee. . . . " *Id.* § 6363(a). In any case in which the employing agency has reason to doubt the validity of the certification provided . . . the employing agency may require, at the expense of the agency that the employee obtain the opinion of a second health care provider. . . .

***Id.* § 6383(c)(1).**

The anti-retaliation provision of Title II, 5 U.S.C. § 6385 states:

> An employee shall not directly or indirectly intimidate, threaten, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of any rights that such other employee may have under this subchapter.

APPENDIX G

U.S. CUSTOMS AND BORDER PROTECTION
Department of Homeland Security
1300 Pennsylvania Avenue, N.W., Washington D.C. 20229

September 5, 2003

Mr. Eugene Cavicchi
5 Island Ave 6D
Miami Beach, FL 33139

RE: Arbitration on National Vetting Policy
National Treasury Employees Union (Union)
U.S. Customs Service (Agency)

Dear Mr. Cavicchi:

An arbitration hearing was held in 2002 on a dispute concerning the Agency's implementation of a national vetting policy. The parties agreed to defer evidence about the effects of the vetting policy on particular employees until after the arbitrator issued a decision on the underlying grievance. The arbitrator has issued a decision finding that the Agency violated contract provisions by failing to provide advance notice to, or bargain with, the Union over its national vetting policy. Now the Agency and the Union are preparing for a second hearing where evidence will be taken concerning the effects of the vetting policy on particular employees who were recommended for selection in certain promotion actions, geographic reassignments, or for entry into core positions, but who were not selected following completion of the vetting process. The purpose of this hearing is to determine whether the particular employees who were not selected following the completion of the vetting process would have been selected "but for" the Agency's failure to provide advance notice to, or bargain

with, the Union about the implementation of the vetting process and whether the Agency should be required to make these employees whole for whatever loss of pay or benefits they may have suffered as a result of the Agency's contract violations.

In preparing for these arbitration proceedings, the Agency has determined that you were one of the employees recommended for selection but you were not selected following the completion of the vetting process. The Agency has been asked to release both your name, and information concerning the reason you were not selected, at the remedial hearing to be held in this case. Unsanitized information about the reason you were not selected will probably contain derogatory information about you because, in general, these nonselections were based on past disciplinary actions an employee had received or pending investigations of misconduct allegations against the employee.

As the disclosure of such disciplinary of investigatory information, in which employees have significant privacy interests, is generally prohibited by the Privacy Act, we do not want to release this information about you without your permission. Of course, the release of this information would be very helpful in determining what, if any, make-whole remedy might be warranted in the circumstances of this case. Therefore, we are asking for your consent to release this information about you at the upcoming hearing in the arbitration case in order to determine whether any remedy is warranted.

If you are willing to allow the release of this disciplinary or investigatory information about you at the arbitration hearing, please sign the consent form at the end of

this document and return it to me at the FAX number listed below as soon as possible. As the hearing on the remedial issues is scheduled for October 1, it is important that you return it to me by FAX no later than September 12, 2003. If you are not willing to allow the release of such information about you, please sign the line stating you do not consent to such a release.

If you have any questions about this matter, please feel free to contact me at 202-927-6913 or the Union attorney, Jonathan Levine, at 202-572-5500.

Very truly yours,

/s/ Nancy L. Elam
Nancy L. Elam
Agency Attorney
202-927-6913 (Phone)
202-927-6940 (FAX)

cc: Margery F. Gootnick, Arbitrator (sanitized)